82-1441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. .....

DONALD KINNEY and MARGARET KINNEY,
Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ARTHUR W. TEAGUE, MANUEL MENDOZA, GERALD W. STRICKLAND, THOMAS A. SIMONS, IV, CLEMENT VAUGHAN and EDWARD B. RUST,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The "QUESTION PRESENTED" as stated in BRIEF-IN-OPPOSITION says: "Whether a Complaint in Federal Court may be dismissed upon the Court's Motion without Notice and Hearing where it appears beyond doubt that Plainntiff can prove no set of facts in support of his claim which would entitle him to relief."

Respondents are clearly stating that Opposition to this Petition is solely because the Complaint fails to state a cause of action upon which relief can be granted under 42 U.S.C. § 1983. Thusly the question of a lack of jurisdiction appearing on the face of the Complaint has been abandoned. The sole defense presented now is "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim". The Opposition now must say that a Federal Court can dismiss a case without any Notice or Hearing for failure to state a cause of action upon which relief can be granted. Rule 12 (b)(6). There are no cases cited and none available holding that a Complaint can be dismissed without an opportunity to be heard where the grounds for dismissal is the failure to state a cause of action upon which relief can be granted but the Opposition wants this Court to make a predetermination that we "can prove no set of facts". When the term "prove no set of facts" is used it indicates that this Court is asked to examine and visualize all possible factual circumstances that could evolve from the Complaint and thus to come forward with a conclusion supporting their position. Irrelevant and misleading arguments are used. Paragraphs 1, 2, 3 and 4 of Argument I claim "limited Federal jurisdiction" and presumably are to be applied to this case. 42 U.S.C. § 1983, 28 U.S.C. § 1343 give express jurisdiction to Federal Courts for the litigation of § 1983 actions. Therefore, an argument which says the Federal Courts lack jurisdiction

simply is not true. The pattern followed is to make assertions in argument which do not apply to the situation. For example, on page 5, the opposition says that lack of subject matter jurisdiction may be raised any time, but subject matter jurisdiction is admitted by their "QUESTION PRESENTED".

Our Reply is a claim that Respondents' Brief is an improper legal document. An analysis of the cases cited therein establishes this. Not a single authority cited supports the QUESTION PRESENTED in Respondents' Brief. The improper use of citations is so numerous as to constitute a calculated effort to obscure and mislead. The true content of the cases cited is now stated to prove this. Space limitation does not allow exposure of all the cases.

The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 33 S.Ct. 410, 57 L.Ed. 716 (1913) as to the Decision and Opinion directly upholds and explains our position and directly contradicts the position taken by the Opposition. Justice Holmes says "when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim." Sec. 1983 is an act of Congress. Justice Holmes goes on to state "jurisdiction is authority to decide the case either way". In referring to the complaint, Justice Holmes says "the plaintiff sued upon the patent law", then goes on to say "the plaintiff relies upon it as an infringement and nothing else; so that good, or bad, the cause of action alleged is a cause of action under the laws of the United States". The case goes on to state "the party who brings the suit is master to decide what law he will rely upon . . . that question cannot depend upon the answer". It cannot be true that this case does anything but discredit the Opposition's Brief. In any event, "Fair" case had a hearing "the case was set down for hearing on the plea".

Petitioner's sole claim has been the denial of a hearing.

The second case cited is *Montana-Dakota Company v. Northwestern Public Service Company*, 341 U.S. 246, 71 S. Ct. 692, 95 L.Ed. 912 (1951) which says "as frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action". The Opposition is confusing the two questions. The case continues "Petitioner asserted a cause of action under the Power act. To determine whether that claim is well-founded the District Court must take jurisdiction whether its ultimate resolution is to be in the affirmative or the negative". The deception involved in the Opposition's approach is the failure to state in all of the cases cited that a Dismissal without a hearing is never upheld. The above case explains the difference between jurisdiction and the power to make a ruling on a Motion to Dismiss for failure to state a claim.

All three cases cited in Footnote 6 on page 5 of the Brief reject a dismissal without a hearing. Based on the Opposition's QUESTION PRESENTED, it is improper to cite cases which do not support their position as "PRESENTED". Footnote 6 also cites *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) which was the Court of Appeals sole authority for dismissal without a hearing, which case we have discussed in our Petition as being a false authority.

The *American Fed. of Musicians v. Bonatz*, 475 F.2d 433 (3rd Cir. 1973) is a clear example of an improper use of a citation for therein we find this language "the record must clearly establish that after jurisdiction was challenged the plaintiffs had an opportunity to present facts by affidavit or by deposition or in an evidentiary hearing, in support of his jurisdictional contention".

Also, "we hold only that it was error for the district court to decide that issue with this record on a sua sponte Rule 12(b)(1) motion." This case says even if it is a question of "jurisdiction", a hearing is required.

In *Topping v. Fry,* 147 F.2d 715 (7th Cir. 1945) a jurisdictional question was involved viz. namely an amount, and there was a lower court Dismissal based on a Motion by Defendants but oral argument was denied. The court reversed the case saying "We think plaintiff should have been given an opportunity to clarify his complaint. The very deficiencies of the pleading seem to furnish all the more reason why it should not have been dismissed on defendants' motions without leave to amend." It is deceptive to cite this case as supporting the Opposition's Brief.

Topping v. Fry, supra, and *Harmon v. Superior Court of California,* 307 F.2d 796 (9th Cir. 1962) have been cited below and in this Court in support of our position that a denial of a hearing is a denial of due process. Both were actual decisions on the facts of those cases justifying Petitioners use of them. The Opposition uses them also, not to distinguish, but to support their position. They rely upon a dicta statement which says "it cannot dismiss for lack of jurisdiction without giving the plaintiff an opportunity to be heard unless such lack appears on the face of the complaint and is obviously not curable". The line that follows is decisive as to which side is using *Harmon* and *Topping,* supra, correctly when it says "This is not such a case". Our case is governed by the *Harmon,* supra, *decision* and Opposition at times seems to say it qualifies under the dicta "exception". *Harmon,* supra was a § 1983 Complaint and the Court held that this conferred "jurisdiction" upon the lower court in these words "Appellant has attempted however imperfectly, to state

a claim under acts of Congress that expressly give the District Court jurisdiction. That Court then had jurisdiction". The Court went on to identify the Dismissal as based on a "failure to state a proper cause of action" and was not based on "want of jurisdiction". The court concluded with this universal rule "The right to a hearing on the merits of a claim over which the court has jurisdiction is of essence of our judicial system." *Harmon* denounces any attempt to argue about who should be or cannot be defendants in a § 1983 action without allowing a hearing. This is what Opposition's Brief does referring to "attorneys" "a member of the Nebraska State Bar" "private defendants" "corporate defendant" "private entities". *Harmon*, supra correctly labels the Opposition here as follows "The claim may be, as appellees assert, entirely spurious . . . It may be that appellant cannot amend to state a claim. But those are not questions before us." How can Opposition legitimately cite *Harmon*? Their own QUESTION PRESENTED proves that question of "jurisdiction" is not germane. They claim the *Harmon* "dicta" as authority but admit that the Harmon "decision" is applicable. Every case cited by Opposition holds that a Dismissal without a Hearing is wrong when it is based on an appellee's contention that the "Plaintiff can prove no set of facts in support of his claim". The concluding clause in Opposition's QUESTION PRESENTED definitely excludes the possibility that we are dealing with a jurisdictional question in these words "which would entitle him to relief". Appellee has expressly gone to the merits.

Both sides have cited American Fed. of Musicians v. Bonatz, supra, which was a reversal of a Dismissal without a hearing of a civil rights complaint. (see our Petition, p. 9). The Dismissal was on the basis of lack of jurisdiction. Opposition cites this in a footnote to support

its assertion of "an incurable jurisdictional defect" and asks the Court to condone a non-hearing below. The case condemns what the Respondents urge.

Brief-in-Opposition having falsely structured itself into the position of a defendant who made and argued successfully below a Motion to Dismiss a § 1983 complaint for failure to state which could be proven by any "set of facts" "which would entitle him to relief" now proceeds to produce arguments here which were never made below. P. 10, 11, 12 of Opposition's Brief. This reaches a climax when *Dennis v. Sparks* is cited, p. 12, as authority and in the same paragraph where justification is claimed for the "no hearing" below. First of all *Dennis v. Sparks*, supra, held that a claim under § 1983 was stated. Respondent uses said case to state certain essentials for stating a claim for which relief could be granted under § 1983 and says that not enough facts are contained in our Complaint to show "color of law". "Color of law" is not jurisdictional and necessarily involves a Motion under Rule 12 (b)(6) whether a cause of action is stated upon which relief can be granted, which universally requires a Hearing. It is improper in the same paragraph to claim that lack of jurisdiction appears on the face of this § 1983 Complaint which is "obviously not curable" and then claim that lack of adequate allegations of "color of law" proves this lack of jurisdiction, all as a means of justifying a denial of a "due process" Hearing. Whether a complaint shows "color of law" can never be jurisdictional. A Complaint under § 1983 is necessary to even discuss the matter which automatically confers jurisdiction. P. 12 footnote cites *Harmon*, supra, in false support. Also, *Aasum v. Good Samaritan Hospital*, 542 F.2d 792, 794 (9th Cir. 1976) which was a Dismissal but not one without a Hearing and was based on the question of an "invidious discrimination".

See "QUESTION PRESENTED" as stated by Respondents, who say "Plaintiffs can prove no set of facts which would entitle him to relief". Use of the words "cannot prove" goes beyond Complaint allegations and refers to a complete lack of evidence from anyone about anyone or anything. Using the phrase "in support of his claim" admits jurisdiction. Respondents present the two components involved in a defense motion for failure to state a claim, Rule 12, down to even identical language. The pretense involved however is that this Respondents' Brief invites this Court to deny Certiorari on a false basis. Conclusive evidence that "facts" of a claim is solely Respondents' position arises from use of "beyond doubt". Respondents are contending that they can obtain a Dismissal for failure to state a claim, if they had filed one? This Court is not a proper forum for the initial determination of a Motion under Rule 12 (b)(6). Respondents are making assertions of "facts", telling this Court that these are true and asking this Court to accept them as true, and rely upon them and act upon them to deny the Petition. How true is the Respondents assertion "beyond doubt"? When the term "prove" was used reference could only be made to the existence of a "set of facts". Petitioners cannot "prove" a set of facts in support of their § 1983 claim if United States Courts are not going to let them. Denial of access to the Courts and a denial of Hearing are the same. Respondents position equals the two lower Federal Courts. Their request here is to make permanent the denials below of any opportunity to "prove" "facts" of his "claim". Respondents Brief is a "solicitation" to this Court not to grant Certiorari because the Constitutional right to a "hearing" is not worth this Court's time and recognition in *this* particular § 1983 case. Since usually Certiorari to this highest Court in the land is identified as "discretionary" Respondents

position becomes a more serious infringement of the Petitioners rights to "get" due process. Since Respondents chose not to ask American Courts to reverse their universal stand requiring a hearing for Rule 12(b)(6) Motions they have advanced this false statement of fact "Plaintiff can prove no set of facts". If an attorney's going "back door" to a State Judge, secretly, asking him to act in behalf of his liability insurance company so as to accomplish its objectives and obtaining judicial cooperation to the extent of setting up a new illegal court through the cooperation of several state judges so that the objectives of the conspiracy could be accomplished and victory thus gained over the Petitioners by the defendants in combination with state judges where the Petitioners were denied a hearing or any rights whatsoever and where this is documented as contained on p. 61 of their Petition is not a "set of facts" in support of this § 1983 claim, then why not allow a hearing?

Respondent Thomas A. Simons, IV, an attorney, knows that the above was done because he personally wrote the letter and secretly, unethically and illegally solicited judicial help, obtained it and acted on it. Respondent State Farm knows that this was done because it engagd Respondent Thomas A. Simons, IV, to invade the state judicial processes to accomplish the above and paid monies for that purpose and personally acted on it against the Petitioners. It personally participated in the illegal proceedings. It acted through Respondents Teague and Simons, to accomplish the destruction of Petitioners' rights. Respondents Mendoza and Strickland personally participated in the above. A tape which was in existence and in the possession of the Court Administrator would be "evidence" of how the "back door" approach was translated by judicial officials into judicial action. This "tape" referred to in the Petition has "facts in support

of the claim which would entitle him to relief". Respondents' assertion to the contrary is a false statement of fact. Their Brief is based on false assertions of fact. Respondent State Farm is involved in extensive litigation everywhere. Its authorization of an unethical approach to judicial officials is that of an entity that is not naive in judicial procedings. If § 1983 cannot be used, where is the deterrent to wide spread attempts for judicial favors and advantages over an adversary by unethical methods? Respondents are claiming the right to do just that. If the Federal Courts deny a Hearing to § 1983 objections to corrupt practices on the grounds that no jurisdiction exists to take the case, there is no deterrent in Federal Courts.

Respondents assertion, p. 10, that "certain of Petitioners cited cases deal with dismissals on the merits which, with their res judicata effect, are also inapposite under the facts of the instant case", contains its own refutation since how can a consideration of "facts of the instant case" be anything other than a Dismissal on the merits. When Respondents concluded this paragraph by calling the instant dismissal a jurisdictional dismissal, they contradict themselves and their own "QUESTION PRESENTED" which per se excludes a jurisdictional Dismissal. The assertion that Petitioners have "no set of facts" which would enable them to recover is not a jurisdictional question. In quoting on p. 10 from *Herzog & Straus v. GRT Corp.*, 553 F.2d 789, which Petitioners had cited as authority for the necessity of a hearing, Respondents say that the "preclusive effect upon further litigation on the merits" of a summary judgment distinguishes it from the instant case. When Respondents asked the Dismissal here be upheld because "Plaintiff can prove no set of facts in support of his claim" they certainly are asking for a Dismissal "which might have

a preclusive effect on further litigation on the merits". Respondents never have said what is lacking in their lack of jurisdiction assertion unless it is a failure to name state judges as defendants. The argument denounced in *Dennis v. Sparks*, supra, that the use of State Judges would absolve non-judges from liability is being made again. This renewal patently is an inquiry as to what is required to state a cause of action upon which relief can be granted. Everytime such a question arises, a Hearing has been required.

Respondents attempt to prevail under the "substantial federal question" doctrine contains false statements of law and a false application of the doctrine to this case, culminating in the false use of a U.S. Supreme Court citation, *Hagans v. Lavine*, 415 U.S. 528, 94 S. Ct. 3172, 39 L.Ed. 2d 577 (1974). This argument appears for the first time. To say that this § 1983 claim does not contain a "substantial federal question" is like saying that the 14th Amendment is insignificant. There was a hearing in Hagans. To determine whether a "substantial federal question" is involved obviously requires an analysis of "the facts" thereby excluding a dismissal for lack of jurisdiction.

CONCLUSION

Can the denial of Certiorari be anything less than the acceptance of Respondents position that in this exceptional case involving state judges denial of the right to a hearing is approved.

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